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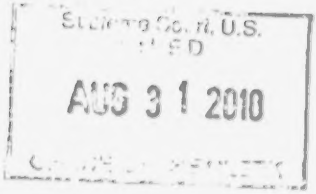

No. 10-169

IN THE

Supreme Court of the United States

JONATHAN KNIGHT,

Petitioner,

v.

DAVID DRYE, *et al*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

The question before this Honorable Court is whether Knight engaged in speech that would entitle him to the protection of the First Amendment.

The Appellate Court affirmed the Trial Court's holding that there were no genuine issues of material fact to support Knight's claim that he engaged in protected speech.

Knight was terminated by Chalfont Borough after the Borough learned that he had informed a known drug dealer, Whitney Watson, that Watson was the subject of an undercover narcotics investigation by a multi-agency drug task force. Knight's conduct violated the Borough's civil service rules as well as the police department's policy against disclosing confidential information to the public. Knight was suspended by the Borough while the Office of the District Attorney of Bucks County, Pennsylvania, through a grand jury proceeding, conducted a criminal investigation. After the grand jury indicted Knight on charges of obstructing the administration of law or governmental function and hindering prosecution, the Borough Council voted to terminate Knight's employment.

While Knight was acquitted of the criminal charges following a jury trial, his termination was upheld in an arbitration decision.

In his lawsuit, Knight claimed that the real reason for his discharge is because he allegedly complained about misconduct of a fellow officer and the Borough Manager.

After careful consideration of the evidence of record, the Appellate Court found no genuine issue of material fact concerning whether Knight engaged in protected conduct.

It appears that Knight claims that he engaged in two specific instances of protected conduct by: (1) complaining of alleged misconduct of a fellow officer, Clifford Horn; and (2) observing potential criminal conduct by the Borough Manager at a neighborhood bar while off-duty.[1]

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[1] In proceedings before the Trial Court, Knight offered several additional instances of misconduct that he claimed triggered the First Amendment. Each instance was evaluated by the Trial Court, wherein it found no genuine issue of material fact existed since the record demonstrates that Knight never complained about any of the alleged misconduct. *See* App. 27a-28a at n. 19. Knight did not brief these matters in his appeal to the Appellate Court.

In proceedings before the Appellate Court, and again in his Petition for a Writ of Certiorari, Knight offered that his arbitration and/or grand jury testimony was protected conduct entitled to First Amendment protection. *See* App. 5a at n. 1; Petition at p. 12.

The Appellate Court properly found that (1) Knight's complaint up the chain-of-command is not protected speech under the First Amendment pursuant to *Garcetti v. Ceballos*, 547 U.S. 410 (2006); and (2) Knight's *observation* of potential criminal conduct of the Borough Manager did not create a viable First Amendment claim since Knight *admitted* that he *never reported* the Manager's conduct to Borough officials.

The Appellate Court also properly held that *Reilly v. City of Atlantic City*, 532 F.3d 216 (3rd Cir. 2008) did not stand for the proposition that Knight's out-of-court statements to his superiors constituted "citizen speech" that should be precluded from the "official duties" doctrine set forth in *Garcetti*.

COUNTER-STATEMENT OF FACTS

Since Petitioner, Jonathan Knight (hereinafter "Knight"), misrepresented the facts of record in the Statement of the Facts contained in the Petition for a Writ of Certiorari, Respondents, Chalfont Borough, the Chalfont Borough Council, Mayor Marilyn Becker, Police Chief Frank Campbell, and David Drye (collectively the "Chalfont Borough Respondents" or the "Borough") file the instant counter-statement to correct the record.

While Knight claims that in February of 2005, he reported complaints about the conduct of fellow officer, Clifford Horn, received by a citizen, Whitney Watson, who managed his family's car wash located in the Borough, to Chalfont Borough Mayor Marilyn Becker and Chalfont Borough Chief of Police Frank Campbell, this is not supported by the record. The undisputed facts of record, including Knight's own deposition testimony, reveal that Knight reported that Horn improperly issued a traffic citation to an employee of Watson as the conduct giving rise to the citation occurred on private property (a parking lot). Several days later, Knight and a fellow officer, Robert Milligan, informed Chief Campbell that Officer Horn made general inquiries into illegal narcotics activity at Watson's car wash (Milligan and Knight were aware that an undercover narcotics investigation had commenced in the area and Watson

was a target). In response, Chief Campbell informed Knight, Milligan and Horn to stay away from the car wash during the pendency of the narcotics investigation. There is no competent evidence of record that suggests Knight ever reported these incidents to Mayor Becker.

Knight also avers that neither Mayor Becker nor Chief Campbell conducted an investigation into his reports concerning Horn. This is not true. Chief Campbell promptly told all involved to stay away from the car wash during the pendency of the investigation. In addition, the improperly issued traffic citation was withdrawn once it was learned that the conduct occurred on a privately owned parking lot.

Knight also claims that in June 2005, he witnessed the Chalfont Borough Manager, David Drye, steal beer from a local bar. In his Petition, Knight claims that he was identified as a witness and reported this event to the municipal Respondents. However, Knight's sworn deposition testimony reveals that Knight never reported this incident to anyone at the Borough. During his deposition, Knight admitted that he did not call the police, did not prepare a report, did not investigate the incident, and did not inform the Chief of Police, the Mayor, or the Borough Council about the incident. The bar owner who was the victim of the theft, Matthew Soncini, testified that Knight informed him that Knight was off-duty and did not want to get involved. There is no competent evidence of record

that suggests Knight reported this incident to the municipal Respondents.

Knight further avers that the "unrebutted facts" of his Affidavit create a material dispute of fact compelling the denial of summary judgment. This is not true, as Knight's Affidavit, submitted on the date that his response in opposition to summary judgment was filed, attempts to revive his claims, and directly contradicts his sworn deposition testimony. Thus, Knight's Affidavit is not competent evidence that should serve to defeat summary judgment.

Knight also disputes the Trial Court's finding that Knight knew of the undercover investigation into Watson, based upon the facts averred in his Affidavit and in a Reply Brief filed by his counsel in opposition to summary judgment. However, Knight may not escape from his own sworn testimony wherein he admits to informing Watson that he was the subject of an undercover investigation.

In an effort to distort the factual record, Knight cites to a portion of his sworn testimony wherein he told Watson to stop dealing drugs as if this testimony shows that he did not "inform" Watson that he was the subject of the undercover investigation. This alone does not create a material factual dispute as to whether Knight also confirmed to Watson that he was the target of the investigation, as the two statements are not mutually exclusive.

While Knight claims in his Petition that he was not terminated until after his arbitration testimony, this belies the undisputed evidence of record. The undisputed facts of record show that Knight appealed his termination to an arbitrator, who conducted a hearing in accordance with the Borough's collective bargaining agreement with the police. Thus, the hearing held pursuant to an appeal from Knight's discharge was conducted after Knight's discharge. Pursuant to Pennsylvania law, there would have been no arbitration hearing on the merits of Knight's discharge prior to the date of actual discharge.

In the Petition, Knight claims that the Trial Court erred by finding that, based on tips from an undercover informant, an investigation commenced. Knight seems to imply that since the Borough did not initiate the investigation, no investigation occurred. This is patently false as it is undisputed that the District Attorney's Office initiated an investigation before a grand jury upon which the Chief of Police relied in making his recommendation to the Borough Council that Knight be discharged.

Finally, while Knight represents that Mayor Becker and Chief Campbell both testified that they did not rely on the criminal charges as a basis to terminate Knight, thereby implying that since Knight was not ultimately convicted of the criminal charges there is no basis to affirm his discharge, the undisputed evidence actually demonstrates that

Becker and Campbell relied on the underlying criminal *investigation* in recommending discharge. The basis of the recommendation was the investigation (which included sworn testimony of witnesses, including Knight, appearing before the grand jury), which demonstrated that Knight had violated the Borough's civil service rules and department policy (and not because Knight was guilty of a crime).

REASONS FOR DENYING THE PETITION

Knight advances three reasons in support of his Petition for a Writ of Certiorari, none of which constitute a valid basis for granting the Petition. Each purported basis for certiorari is analyzed *seriatim*.

Rule 10 of the Supreme Court sets forth the standard governing the grant of certiorari. It provides that a "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. *Id*. A petition for a writ of certiorari will be granted only for compelling reasons. *Id*.

While not all-inclusive, Rule 10 provides three bases governing the question of whether to grant certiorari. Each basis is paraphrased hereinbelow.

> **(a)** a conflict between decisions of the United States courts of appeals on an important federal question;

> **(b)** a decision of a state court of last resort that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> **(c)** a state court or a United States court of appeals' decision on an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

U.S.Sup.Ct. Rule 10, 28 U.S.C.A.

"A principal purpose for which we use our certiorari jurisdiction...is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (U.S. 1991). "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S.Sup.Ct. Rule 10, 28 U.S.C.A.

A. Knight misapplies the legal authority cited in support of certiorari.

The Appellate Court correctly applied this Court's holding in *Garcetti v. Ceballos*, 547 U.S. 410 (2006)

in deciding to affirm summary judgment in favor of the Chalfont Borough Respondents.

Despite the contention of Knight, the holding in *Garcetti* remains sound and undisputed law in that there are no conflicts among the circuits in the application of the holding to police officers.

Knight misapplies the various circuit court decisions upon which he relies for the proposition that the Appellate Court's decision conflicts with *Garcetti*. Upon examination of each decision, it is evident that there is no inconsistency in the Appellate Court's application of the law. For example, Knight relies on *Hope v. Pelzer*, 536 U.S. 730 (2002), a decision that pre-dates *Garcetti*, and involved an Eighth Amendment analysis concerning cruel and unusual punishment, a decision unrelated to the application of *Garcetti*. It is unclear why Knight cites to Hope, as there is no holding in Hope that broadens the First Amendment rights of police officers.

It is equally unclear why Knight relies upon *Behrens v. Pelletier*, 516 U.S. 299 (1996), a decision that did not involve the First Amendment, and predates *Garcetti*, or *Johnson v. Jones*, 515 U.S. 304 (1995), an excessive force claim, also pre-dating *Garcetti*. Neither decision broadens the First Amendment rights of police officers.

Despite Knight's representation that the case at bar conflicts with *Okin v. Village of Cornall on Hudson Police Dept.*, 577 F.3d 415 (2nd Cir. 2009), *Okin*

is a due process and Equal Protection claim that does not mention the First Amendment or *Garcetti*. Likewise, *Demoret v. Zegarelli*, 451 F.3d 140 (2nd Cir. 2006) is a gender discrimination claim brought pursuant to the Equal Protection clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964, and state law. *Id.* at 144. The case did not involve the application of the First Amendment or *Garcetti*.

While *Skehan v. Village of Mamaroneck*, 465 F.3d 96 (2nd Cir. 2006) is a First Amendment claim, the Court expressed no view on whether plaintiff's statements were made pursuant to his official duties as a police officer, since no factual record had been developed on that issue. *Id.* at 106. Accordingly, the decision of *Garcetti* was not applied by the Second Circuit and, thus, the decision does not serve to show a conflict among the circuits, as Knight would suggest.

Likewise, while *Munafo v. Metropolitan Transportation Authority*, 285 F.3d 201 (2nd Cir. 2002) involved a First Amendment claim, the Second Circuit declined to render a decision on the question of whether the individual defendants were entitled to qualified immunity on the ground that the Court lacked jurisdiction over the appeal with respect to the First Amendment claims. *Id.* at 211. Accordingly, the Second Circuit never applied a First Amendment analysis in its decision, and did not apply *Garcetti* since the decision pre-dates *Garcetti*.

Munafo does not support Knight's contention that the Appellate Court's decision conflicts with *Garcetti* or other circuit decisions that have considered the scope of the First Amendment.

In *Harman v. City of New York*, 140 F.3d 111 (2nd Cir. 1998), the sole issue before the Court was a First Amendment prior restraint claim filed by employees of a City agency. The question before the Court was whether two press policies, which limited the ability of employees to provide statements to the press, constituted an unconstitutional prior restraint on employee speech in violation of the First Amendment. *Id.* at 114-116. The Second Circuit affirmed summary judgment in favor of plaintiffs holding that the policies represented an unlawful prior restraint. *Id.* at 119, 124. While a First Amendment retaliation claim had initially been filed by a plaintiff employee who had been disciplined for violating the policies by speaking with ABC News, the claim was not considered by the Second Circuit, as it was not one of the issues raised in the cross-motions for partial summary judgment that was subject to the appeal. *Id.* at 117. Accordingly, Knight's reliance on Harman is misplaced as it does not reflect an inconsistent application of *Garcetti* or by any case reported in the Third Circuit.

In *Frank v. Relin*, 1 F.3d 1317 (2nd Cir. 1998), the Second Circuit vacated the district court's decision granting summary judgment in favor of the defendant employer on the basis of qualified immunity in

a First Amendment retaliation claim on the basis that there were questions of fact as to the reasons plaintiff was discharged. *Id.* at 1329. There was no dispute among the parties over whether plaintiff had reported possible wrongdoing. Therefore, Frank does not support Knight's contention that the Appellate Court's decision in the case at bar conflicts with Second Circuit jurisprudence.

Since Knight has failed identify a conflict among the circuit courts or with a decision of this Honorable Court, the Petition should be denied.

B. The Appellate Court decision does not conflict with *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Garcetti holds that the First Amendment does not protect a public employee for statements made while pursuing his official duties. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

With respect to the first of the two instances of allegedly protected conduct advanced by Knight, involving the alleged misconduct of Officer Horn, Knight admitted in his sworn deposition testimony that these complaints were made up the chain of command to his superiors in accordance with his official duties as a police officer.

The Appellate Court properly reasoned that any complaints that Knight made up the chain-of-command to his superiors were properly subject to

his official duties as a police officer and, consequently, Knight was precluded from asserting a First Amendment retaliation claim in light of *Garcetti*. See also *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3rd Cir. 2007). Moreover, Knight admitted in his sworn deposition testimony that he made complaints up the chain of command in accordance with his duties as a police officer. Knight offers no Supreme Court or circuit court decision that contradicts the holding of the Appellate Court in this respect.

With respect to the second instance of allegedly protected conduct advanced by Knight, involving his observation of potential criminal conduct of Borough Manager Drye, Knight admitted in his sworn deposition testimony that he never made a report about the incident. Thus, summary judgment was resolved on the basis of the lack of any factual dispute, and not on the alleged misapplication of *Garcetti*.

To the extent Knight bases his Petition upon the application of the doctrine of qualified immunity, neither the Trial Court nor the Appellate Court based their decisions on the doctrine of qualified immunity.

C. The Appellate Court decision does not conflict with *Reilly v. City of Atlantic City*, 532 F.3d 216 (3rd Cir. 2008).

Knight misinterprets *Reilly v. City of Atlantic City*, 532 F.3d 216 (3rd Cir. 2008), whose holding is limited to the First Amendment's protection of sworn testimony presented at trial, concerning the conduct of co-workers. Here, Knight's alleged conduct involved his report of a fellow police officer's alleged misconduct to the Chief of Police.

Reilly held that truthful testimony at trial concerning the misconduct of a fellow police officer falls within the purview of First Amendment protection. *Reilly*, 532 F.3d at 231. This holding arguably creates an exception to the general proposition articulated in *Garcetti* that speech made pursuant to a plaintiff's official duties is not protected under the First Amendment.

In the instant case, the gravamen of Knight's complaint is premised upon his statements (up the chain of command) to Chief Campbell that Officer Horn engaged in misconduct while on duty. Knight does not claim that he ever testified against Horn in court. Accordingly, the holding in *Reilly* does not support Knight's claim here.

Knight also complains that "the lower court simply excluded consideration of the arbitration testimony as a basis for a First Amendment claim." Petition at p. 12. However, the Trial Court did address Knight's arbitration claim, finding that the claim would also fail because it is "undisputed that Knight was terminated before any demand for arbitration was made." See App. 29a.

To the extent Knight claims that *Reilly* holds Knight's grand jury testimony constitutes public speech, it fails on three grounds: (1) this claim was not raised before the Trial Court and, as a result, is waived on appeal, See *Bagot v. Ashcroft*, 398 F.3d 252, 256 (3d Cir. 2005), (2) Reilly involved the plaintiff police officer's testimony concerning alleged misconduct of other officers (not himself); and (3) the subject matter of Knight's grand jury testimony in defense of criminal charges against himself is clearly personal, and not a matter of public concern, thereby triggering the well-settled law that only matters of public concern, and not personal grievances, are actionable under the First Amendment as protected speech. *Connick v. Myers*, 461 U.S. 138 (1983); *Garcetti*, 547 U.S. at 420. Accordingly, the Appellate Court properly rejected Knight's position.

D. The Trial Court did not err in applying all inferences in favor of nonmovant as required by Federal Rule 56.

It is clear from the Appellate Court's decision there were no facts in dispute concerning the question of whether Knight engaged in protected conduct. In support thereof, the Appellate Court relied upon Knight's sworn deposition testimony, wherein he admitted that he never reported the purported misconduct of the Borough Manager to any municipal official.

While Knight attempts to create an appearance of disputed material fact by the submission of a self serving Affidavit that directly contradicts his own sworn deposition testimony, a court is not compelled to accept it as "genuine" for the purpose of defeating summary judgment. See, e.g., *In re CitX Corp., Inc.*, 448 F.3d 672, 679 (3d Cir. 2006) (noting that a "sham affidavit" is one that attempts to "explain away or patch up an earlier deposition in an attempt to create a genuine issue of material fact," and explaining that the "sham affidavit doctrine" generally "refers to the trial courts' practice of disregarding an offsetting affidavit that is submitted in opposition to a motion for summary judgment when the affidavit contradicts the affiant's prior deposition testimony") (citation omitted); see also *Jiminez v. All American Rathskeller, Inc.*, 503 F.3d 247, 253 (3d Cir. 2007)

("[I]f it is clear that an affidavit is offered solely for the purpose of defeating summary judgment, it is proper for the trial judge to conclude that no reasonable jury could accord that affidavit evidentiary weight and that summary judgment is appropriate."). Accordingly, any alleged "disputed fact" in which Knight relies on his Affidavit to create should be rejected if the fact contained in the Affidavit contradicts his own sworn testimony.

Moreover, while Knight states that the Trial Court ignored the standard governing summary judgment by failing to draw all factual inferences in favor of the Petitioner, Knight fails to identify the specific facts that were not drawn in his favor. The emphasis that Knight places on the Appellate Court's decision that a police officer's reports up the chain of command fall within an officer's official duties is misplaced, as this is a legal determination and not a failure to properly infer facts. In fact, it is not disputed that on one occasion, Knight reported alleged misconduct concerning Officer Horn to his superiors. The conclusion of the Court is based on law, not an interpretation of disputed facts. Likewise, as to the only other alleged report, concerning alleged misconduct of Drye, Knight admits to never making said report. Thus, there is no "inference" for the Trial Court to draw, as no report was ever made.

Likewise, Knight fails to draw a distinction between a "matter of public concern" and whether that concern was raised pursuant to a police officer's offi

cial duty. The Chalfont Borough Respondents do not dispute that bona fide and good faith allegations of police misconduct are matters of public concern. However, the position advanced by the Chalfont Borough Respondents, and adopted by the Appellate Court and Trial Court, is that police officers are duty-bound to report alleged police misconduct to superiors as part of their job.

Likewise, while Knight complains that the Appellate Court failed to address the "un-rebutted facts" that Knight had reported Horn for additional acts of alleged misconduct to Mayor Becker, the Trial Court did address these allegations, finding that these reports were also made pursuant to Knight's official duties (based, in part, on Knight's sworn admissions that the reports were made pursuant to his official duties or that certain other acts of alleged misconduct were never reported). See App. 27a-28a at n. 19. The Appellate Court did not address these "facts" as Knight failed to brief the facts in the Appellate Court proceedings. As such, they are waived.

To the extent Knight faults the Trial Court's citation to grand jury testimony in its opinion on the basis that the grand jury testimony was not cited by the Borough as a basis for Knight's discharge, such a position is nonsensical. The Trial Court cited the grand jury testimony only as a means to develop the factual background of the case, and not as a specific basis for Knight's discharge (as the grand jury testimony did not focus on Knight's discharge but,

rather, the criminal conduct of Knight). Moreover, the Trial Court expressly stated that to the extent there were disputes of fact, it adopted Knight's version of facts. See App. 10a-11a at n. 5.

Knight's further contention the Trial Court's reliance upon sworn grand jury testimony cloak him with First Amendment protection is ridiculous since Knight never raised such a claim before the Trial Court.

Knight concludes his Petition by misconstruing the record by advancing the position that the Trial Court erred by finding that " 'based upon these tips from an undercover informant' an inquiry was begun" on the basis that the finding is unsupported by the record. However, it is Knight's position that is unsupported by the record. The undisputed evidence reveals that the District Attorney commenced the investigation through grand jury proceedings, after an initial investigation by County detectives.

Likewise, while Knight claims that Becker and Campbell "deferred to the criminal process" implying that the end result of the criminal process should carry the day, Becker and Campbell's deferral to the criminal process does not necessarily mean that the basis for terminating Knight's employment was a criminal conviction. In fact, the basis for termination has been consistent from the very beginning, that is, Knight's violation of the Borough's civil service rules and department policy.

CONCLUSION

For the reasons set forth above, the Chalfont Borough, Respondents respectfully request this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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